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UNITED STATES PATENT AND TRADEMARK OFFICE

**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Ex parte ROBERTO CARLOS PEREZ, JUAN DIEGO TOMAS, ELENA
CRISTINA GONZALEZ and JAIME BRAVERMAN

Appeal 2009-3880
Application 10/696,181
Technology Center 3700

Decided:¹ April 21, 2009

Before ERIC GRIMES, FRANCISCO C. PRATS, and STEPHEN WALSH,
Administrative Patent Judges.

WALSH, *Administrative Patent Judge.*

DECISION ON APPEAL

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, begins to run from the decided date shown on this page of the decision. The time period does not run from the Mail Date (paper delivery) or Notification Date (electronic delivery).

This is an appeal under 35 U.S.C. § 134 involving claims to an absorbent article. The Patent Examiner rejected the claims as obvious. We have jurisdiction under 35 U.S.C. § 6(b). We affirm.

STATEMENT OF THE CASE

Appellants' invention is an absorbent article. (Spec. 1:8-9.) According to the Specification, absorbent articles generally comprise three layers: a liquid permeable cover layer, a liquid impermeable bottom layer, and an absorbent core between the cover and bottom layers. (*Id.* at 1:10-12.) The claimed article comprises a cover layer that has ink indicia and tapering apertures. (Claim 27.)

Claims 27-41 are on appeal.² The Examiner rejected the claims under 35 U.S.C. § 103(a) as unpatentable over Ouellette³ and Raley.⁴ Appellants argue claim 28 separately. We select claim 27 as representative for claims 29 to 41, all of which depend upon claim 27. 37 C.F.R. § 41.37(c)(1)(vii). Claims 27 and 28 read:

27. An absorbent article, comprising:

a cover layer comprising a user contacting surface and a non-contacting surface,
wherein said cover layer has indicia formed thereon,
wherein said cover layer defines one or more apertures having an opening that tapers in a direction extending away from said user contacting surface towards said non-contacting surface;

² Claims 17-26 are also pending but were withdrawn from consideration following Appellants' election of claims 27-41 for examination. (App. Br. 2.)

³ U.S. Patent No. 5,431,643, issued to Ouellette et al., Jul. 11, 1995.

⁴ U.S. Patent No. 4,846,813, issued to Raley, Jul. 11, 1989.

- a bottom layer; and
- an absorbent layer disposed between said cover layer and said bottom layer.
28. The absorbent article of claim 27, wherein said indicia are formed upon said non-contacting surface.

OBVIOUSNESS

The Issues

The Examiner found that Ouellette described an absorbent article having all the features of claim 27 with one difference: Ouellette's apertures were not said to be tapered. (Ans. 3.) However, the Examiner found that Raley described an absorbent article having a topsheet with tapered apertures. (*Id.*) The Examiner concluded that it would have been obvious "to modify the apertures of Ouellette to provide apertures with tapered openings because apertures with tapered openings will allow for more effective acceptance and retention of liquids as taught by Raley." (Ans. 4.)

Appellants contend that (1) there is no factual basis for the Examiner's "[p]resumption that an [a]dvantage [w]ould [r]esult from a [m]odification of the [f]luid [p]ervious [c]over [l]ayer of Ouellette" (App. Br. 5-6), and (2) none of the prior art teaches that Ouellette's cover layer would be improved by tapered apertures (App. Br. 7-8). Appellants further argue that the two references do not teach indicia on a non-contacting surface of a cover layer, as recited in claim 28. (App. Br. 8-9.)

The issues with respect to this rejection are

Did the Examiner err in concluding that a person of ordinary skill in the art would have considered it obvious to substitute tapered apertures,

disclosed by Raley as being suitable in the topsheet of an absorbent article, for the apertures in the topsheet of Ouellette's absorbent article; and

Did the prior art teach indicia on a non-contacting surface of a cover layer?

Findings of Fact

Ouellette

1. Ouellette described an absorbent article having a fluid pervious topsheet (a cover layer), a fluid impervious backsheet (a bottom layer), and an absorbent core positioned between the top and back sheets. (Col. 2, ll. 35-39.)
2. Ouellette's topsheet had a pattern of fluid impervious areas deposited on it. (Col. 2, ll. 40-43.)
3. Ouellette's topsheet could be a variety of materials including hydroapertured and other apertured fabrics. (Col. 4, l. 57 – col. 5, l. 6.)
4. In a preferred embodiment shown in Fig. 5, Ouellette's "fluid impervious areas **236** should be at or below the uppermost plane of the fibers **250** of which the topsheet **228** is comprised, thereby allowing the wearer to experience the soft, tactile feel of the nonwoven material." (Col. 5, l. 66 - col. 6, l. 2.)

Raley

5. Raley disclosed an absorbent article suitable for use in disposable diapers, sanitary napkins, incontinence pads, etc. (Col. 4, l. 67 – col. 5, l. 2.)
6. Raley’s article had an absorbent web between a topsheet and bottom sheet. (Col. 5, ll. 6-13.)
7. Raley’s topsheet was fluid impervious, and had a plurality of tapered openings. (Col. 5, ll. 41-54.)
8. According to Raley, “fluid contacting the topsheet, surface tensionally enters the tapered passages at the bases thereof for passage therethrough to exit at the apexes thereof into the absorbent web.” (Abstract.)
9. Raley taught that “in any given application, one of ordinary skill may readily determine the specific arrangement and density of the tapered passages necessary or desirable for the various regions of the topsheet, or for the topsheet as a whole.” (Col. 6, ll. 60-66.)

Principles of Law

Obviousness is a question of law based on fact findings. The scope and content of the prior art are determined; differences between the prior art and the claims at issue are ascertained; the level of skill in the art is resolved; and objective record evidence of nonobviousness is considered. *Graham v. John Deere Co.*, 383 U.S. 1, 17-18 (1966). Against that background, the obviousness or nonobviousness of the subject matter is determined. *Id.*; *In re Kahn*, 441 F.3d 977, 985 (Fed. Cir. 2006). “[W]hen a patent claims a structure already known in the prior art that is altered by the mere

substitution of one element for another known in the field, the combination must do more than yield a predictable result.” *KSR Int’l Co. v. Teleflex, Inc.*, 550 U.S. 398, 416 (2007). When a claim “‘simply arranges old elements with each performing the same function it had been known to perform’” and yields no more than one would have expected from such an arrangement, the combination was obvious. *Id.* at 417.

“During patent examination the pending claims must be interpreted as broadly as their terms reasonably allow.” *In re Zletz*, 893 F.2d 319, 321 (Fed. Cir. 1989).

Analysis

Claim 27

Appellants argue that the Examiner mistakenly presumed that Ouellette’s article needed “‘more effective acceptance and retention of liquids.’” (App. Br. 6.) Appellants contend that even assuming Ouellette’s article had a problem, the Examiner did not explain how tapering Ouellette’s apertures would improve the acceptance of fluid. (App. Br. 8.) Instead, Appellants hypothesize that tapering the apertures might restrict the flow. (*Id.*) Further, Ouellette’s cover layer is fluid pervious, and there is no explanation that tapered apertures would improve fluid acceptance in a fluid pervious material. (*Id.*) Thus Appellants argue that the Examiner’s position “has no factual basis in the prior art as required by Graham v. John Deere Co.” (App. Br. 8). We disagree.

The Examiner’s fact findings were sufficient to (i) determine the scope and content of the prior art, and (ii) ascertain the differences between

the prior art and the claims at issue. Appellants do not dispute that a person of ordinary skill in the art would have had the skill to understand the Ouellette and Raley disclosures, and to have used Raley's tapered apertures where Ouellette called for apertures, the third *Graham* factor. We agree with the Examiner's *Graham* findings.

Ouellette called for "apertured fabrics" but did not define the aperture shape. (FF3; Claim 11.) To practice Ouellette's disclosure, one of skill in the art would have had to choose a shape, and the prior art provided a shape known to be effective in absorbent articles: Raley's tapered shape. Using Raley's tapered aperture shape would have been the use of a known shape and would have been an obvious choice. *KSR*, 550 U.S. at 416. The tapered aperture was known to pass fluid to an absorbent core when used in the cover layer of an absorbent article, and it would have been expected to perform that function when used in Ouellette's absorbent article. That predictable result supports a conclusion of obviousness. *Id.* at 417. We conclude that the Examiner's findings were sufficient to establish a *prima facie* case of obviousness.

Appellants' disagreement with the Examiner's stated reason for combining the prior art teachings is not sufficient for reversal in this case. The Examiner is required to give "some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness." *KSR*, 550 U.S. at 418, quoting *Kahn*, 441 F.3d at 988. The Examiner gave "more effective acceptance and retention of liquids" as a reason for using tapered apertures. (Ans. 4.) That reason has a rational underpinning.

When prior art teachings are combined, the proper question to ask is whether a person of ordinary skill in the art, facing the wide range of needs created by developments in the field of endeavor, would have seen a benefit to combining the prior art teachings. *KSR*, 550 U.S. at 424. In this case, Ouellette called for an aperture and Raley provided an aperture with a tapered shape. A benefit of the combination is that the tapered aperture was expected to accept fluid and conduct it to the absorbent core. Contrary to Appellants' argument that there must be evidence for an improvement, case law "does not require that a particular combination must be the preferred, or the most desirable, combination described in the prior art in order to provide motivation for the current invention." *In re Fulton*, 391 F.3d 1195, 1200 (Fed. Cir. 2004) ("a finding that the prior art as a whole suggests the desirability of a particular combination need not be supported by a finding that the prior art suggests that the combination claimed by the patent applicant is the preferred, or most desirable, combination").

Appellants note that Raley's tapered apertures improved retention in an article with a fluid impervious cover layer because the apertures close when the core expands from fluid retention. (App. Br. 7.) Appellants argue that there is no explanation for the Examiner's theory of an improvement in fluid acceptance and retention for Ouellette's article having a fluid pervious cover layer. (App. Br. 8.) We are not persuaded by Appellants' argument because there is no evidence that a person of ordinary skill in the art would have been discouraged from following the path set out in the reference, or would have been led in a direction divergent from the path that was taken by the applicant. *See In re Gurley*, 27 F.3d 551, 553 (Fed. Cir. 1994).

Claim 28

Dependent claim 28 adds the limitation that the indicia are formed “upon said non-contacting surface.” The Examiner found that Ouellette’s disclosure met this limitation, citing Ouellette’s discussion of Fig. 5. (Ans. 7.) Appellants disagree. (App. Br. 8-9.)

Ouellette’s Fig. 5 shows fluid impervious areas **236** (corresponding to Appellant’s indicia) are on the topsheet but positioned in dimples so they are not in contact with the wearer. (FF4.) Appellants do not direct us to a special definition for “non-contacting surface.” We interpret the term to include depressed, non-contacting surfaces as Ouellette described in Fig. 5. That is, Ouelette’s indicia **236** are on a non-contacting surface. The evidence supports the Examiner’s finding.

CONCLUSIONS OF LAW

The prior art supports the Examiner’s finding that a person of ordinary skill in the art would have considered it obvious to substitute tapered apertures, disclosed by Raley as being suitable in the topsheet of an absorbent article, for the apertures in the topsheet of Ouellette’s absorbent article; and

Ouellette taught indicia on a non-contacting surface of a cover layer.

SUMMARY

We affirm the rejection of claims 27-41 under 35 U.S.C. § 103(a) as unpatentable over Ouellette and Raley.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED

cde

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